

OPINION
45-214

July 26, 1945 (OPINION)

OFFICERS

RE: Public - Salary During Period of Disqualification

This is in reply to your recent letter requesting an opinion as to whether you may legally issue a warrant to Mr. Oscar E. Erickson, Commissioner of Insurance, for back salary from March 1 to June 16, 1945, the time of his suspension from office during the impeachment proceedings.

The only statute that might have a bearing on the question is section 44-0908 of the North Dakota Revised Code of 1943, which provides as follows:

"No officer shall exercise the duties of his office after he shall have been impeached and before his acquittal. Whenever upon the impeachment of an officer there is no one authorized by law to perform the duties of the office and the senate shall by resolution declare that the public service may suffer by reason thereof, the governor shall designate some suitable person to perform the duties of the office until the end of the trial upon the articles of impeachment. The person so designated shall receive the same salary, fees, and emoluments as such officer would receive if not impeached. If the accused is acquitted, he shall be restored immediately to the office but if he is convicted, the office shall be deemed vacant and shall be filled immediately as provided by law."

You will note, however, that the statute quoted is silent as to whether or not an impeached officer may be paid during the period of disability. When the impeachment proceedings were filed against Mr. Erickson, the senate passed a resolution as provided by the section quoted, and accordingly Mr. Olsness was designated by the Governor as a suitable person with full authority to perform and discharge all the duties of the office of commissioner of insurance during Mr. Erickson's suspension.

Mr. Erickson was acquitted by the senate and was therefore reinstated into the office of commissioner of insurance.

There are two rules of judicial authority governing this situation, and the two rules are discussed by our Supreme Court in the case of *Ness v. the City of Fargo*, (64 N.D. 231).

In that case it appears that one Ness, who was city assessor, was removed by the city commission and excluded from his office. He brought an action in the district court for a review of the action of the city commissioners, and the action of the city commission was held to be void and was set aside, and the decision was upheld by the Supreme Court. Mr. Ness then brought an action to recover salary for the time he was wrongfully excluded from the office. The district court held that he was not entitled to his salary, but the case was

reversed by the Supreme Court in the case cited; namely, *Ness v. the City Fargo*, 64 N.D. 231.

The Supreme Court, speaking through Judge Christianson, said:

"The question in this case is the right of the plaintiff to recover salary during the time that he was excluded from his office by virtue of the void order of discharge or removal entered August 10, 1931.

"The question thus presented is one on which there is a square conflict in the authorities, and frequently a lack of harmony in the adjudicated cases even in the same jurisdiction. Generally speaking there are two rules. One is to the effect that if a person is illegally excluded or suspended from office and a de facto officer occupies and performs the duties of such office for a time, and the salary is actually paid to the de facto officer up to the time of the restoration of the de jure officer, the de jure officer cannot recover the salary during the period of his wrongful exclusion. The other rule is to the effect that a de jure officer who is wrongfully excluded from his office, upon his restoration, is entitled to recover the salary incident to his office during the time that he was wrongfully excluded although during the time of such exclusion the office was occupied by a de facto officer who performed the duties thereof and was paid the salary.

"The first rule is sustained by the greater number of adjudicated cases. Both rules invoke, and purport to give effect to, the principle of public policy. The contrariety in the adjudicated cases is indicative that the question is one of difficulty, and that powerful arguments may be advanced in support of either of the two rules. We have carefully considered both and the reasons announced by the various courts for their adoption and application and have come to the conclusion that the second rule, while adopted only by a minority of the courts, is more in accord with the principles of logic and gives voice to a public policy that is more in accord with the fundamental principles of our jurisprudence than does the so-called majority rule."

We quote further from the decision:

"We therefore reach the conclusion that the plaintiff in this case is entitled to recover salary for the period of time in question. While, as said, we are aware that this is contrary to the weight of authority, we are of the opinion that the rule thus announced is the sounder one. The rule which we adopt is supported, among others, by the following decisions: *Tanner v. Edwards*, 31 Utah, 80, 86 P. 765, 120 Am. St. Rep. 919, 10 Ann. Cas. 1091; *Rasumsen v. Carbon County*, 8 Wyo. 277, 56 P. 1098, 45 L.R.A. 295; *Ward v. Marshall*, 96 Cal. 155, 30 P. 1113, 31 Am. St. Rep. 198; *United States v. Wickersham*, 201 U.S. 390, 50 L. ed. 798, 26 S. Ct. 469; *Cleveland v. Luttner*, 92 Ohio St. 493, 11 N.E. 280, Ann. Cas. 1917D, 1134."

In view of the decision of the Supreme Court of this state in the

case of Ness v. City of Fargo, and the authorities therein cited, it is our opinion that Mr. Erickson would be entitled to this salary during the period of his suspension, and that a warrant should be issued therefor.

NELS G. JOHNSON

Attorney General